IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 7876

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellant,

vs.

OLIVIA WAGNER, as Administratrix with the Will Annexed of the Estate of Nick Wagner, Deceased.

Appellee.

PETITION FOR REHEARING AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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TO THE HONORABLE CURTIS D. WILBUR, BERT EMORY HANEY AND WILLIAM DENMAN, CIRCUIT JUDGES:

The defendant and appellant hereby petitions for a rehearing in this case for the reasons and upon the grounds following:

1. That the statement of facts in the opinion upon which the Court predicated its conclusion that "there is substantial evidence justifying a finding by the jury that the company negligently failed to maintain an adequate opening in its em-

bankment," is unsupported by the evidence and, in fact, is contrary to all the evidence.

2. The Court having found and determined that the flood in question was "unprecedented in volume and extent" there was no duty on the part of the defendant to anticipate and guard against the same and the Court was clearly in error in holding that the question of whether the defendant should have anticipated such a flood was a question for the jury, and in so holding either misread or misconstrued the opinion in the Heckaman case, which is cited, and apparently overlooked the case of Eikland v. Casey, 290 Fed. 880, decided by this Court.

3. The Court having decided that the flood in question was an unprecedented flood, the questions of actionable negligence and proximate cause presented and discussed in the brief for appellant should have been considered in arriving at a proper decision of the case.

4. Rule applied in Salton Sea Cases, 172 Fed. 792, 819, is not applicable to the facts of this case.

BRIEF AND ARGUMENT

I.

STATEMENT OF FACTS IN OPINION INCORRECT

The vital and controlling question is whether the defendant provided sufficient openings or passage-ways for the flow of water through its railroad embankment to satisfy the requirement of the law in this regard. In the opinion it is said:

> "Beaver Creek, in eastern Montana, flows in a northerly direction through the town of Wibaux. On the north side of the town, the company's railroad runs east and

west upon an embankment. Where it crosses the creek, it was supported, at the time of the flood, by a concrete bridge fifteen to twenty feet in height above the bed of the creek. The central span of the bridge was about sixty-five feet wide at the bottom and one hundred feet at the top. In addition there was on either side of the central span a twenty-foot approach span. These latter, however, were filled in before the time of the flood and allowed no egress to surplus water in the creek. In addition to the space under the bridge, there was a small 'viaduct' or opening in the embankment some distance from the bridge which was used as a passage-way for children in normal times, and acted as a spillway in periods of high water."

The Court has completely overlooked the pleadings and evidence with reference to what is termed the viaduct over Wibaux Street, a distance of about 500 feet west of the bridge in question.

In the answer of the defendant it is alleged:

"That in 1912, the defendant company, at the request of the Council of said town of Wibaux, constructed a viaduct or under-ground crossing thru said grade or embankment at a point about 500 feet west of said railway bridge over said Beaver Creek, which viaduct was about 35 feet wide at the bottom and 70 feet wide at the top, and about 15 feet high; that said viaduct was constructed for use as a street crossing from the south side to the north side of said grade or embankment; that said viaduct is so situated that it did also carry off flood waters of Beaver Creek during the high water of June, 1929." (R. p. 34.)

The replication admits this allegation as follows:

"Admits that in 1912 the defendant railway company constructed a viaduct through said grade or embankment at a point about 500 feet west of said road bridge over said Beaver Creek Valley, which viaduct was about 35 feet wide at the bottom and 70 feet wide at the top and about 15 feet high. That said viaduct was constructed for use as a street crossing from the south side to the north side

of said embankment. That it did carry off some flood water during the high water of June, 1929." (R. p. 41.)

There are over 90 references to this viaduct in the testimony contained in the record. It is shown on the large relief map introduced in evidence and is distinctly marked as "Bridge over Wibaux Street" on the plat or map made a part of the brief for appellant.

The witness Lyman, who was the expert and principal witness for the plaintiff, testified:

> "When the water was going thru the bridge so that the entire capacity of the bridge was taken up, there was a lot of water going thru the viaduct." (R. pp. 793-794.)
>
> "In addition to the water that went thru the bridge over Beaver Creek on the day of the flood, I am satisfied that a tremendous volume of water went from the south of town to the north of town under the so-called viaduct; that was additional water to what went thru the bridge." (R. p. 312.)

Mr. Lyman furher testified that the water was passing thru the viaduct at the rate of 18 feet per second. (R. p. 794.)

He also testified:

> "I think the opening to the rails on the top of the viaduct would perhaps have 500 square feet of area in it; and 500 times 18 is 9000." (R. p. 796.)

When it is considered that the viaduct was 35 feet wide at the bottom, 70 feet wide at the top and 15 feet high, as admitted in the pleadings, the area of 500 square feet used by Mr. Lyman is much less than the actual area.

The small "viaduct" referred to in the opinion, and which the Court says "acted as a spill-way in periods of high water," is shown on the large relief map and also on the plat or map made a part of appellant's brief, and is designated as "school under-pass."

This so-called viaduct is situated at an elevation where no water passed thru it in the flood of 1929, and no water has ever passed thru it.

* * * * * *

The statement in the opinion that "The central span of the bridge was about 65 feet wide at the bottom and 100 feet at the top" and that "in addition there was on either side of the central span a twenty-foot approach span" is clearly an error and contrary to all the evidence. The witness Lyman, who, as before stated, was the expert and principal witness for the plaintiff, testified as follows:

> "The railroad company's bridge as it existed there on June 7, 1929, consisted of one 70 foot span with two approach spans of 20 feet." (R. p. 275.)

The witness M. F. Clements, who described the model of the bridge introduced in evidence, testified that the bridge, as it existed at the time of the flood, had a 70-foot central span and an additional twenty foot span at each end (R. p. 580.) The model of the bridge introduced in evidence also conforms to these measurements.

* * * * * *

The statement in the opinion that these additional or twenty foot approach spans were filled in before the time of the flood and "allowed no egress to surplus water in the creek" is also contrary to all of the evidence. The witness Lyman testified:

> "The approach spans had been filled on a slope down from the top of the abutment to the base of the pier, leaving a clear water way of about 65 feet between piers, plus a triangle under each approach span as the water got high." (R. pp. 275-276.)

This is also the testimony of the witness Clements (R. pp.

585 & 591.) He testified that the fill in the approach spans had a slope of 1½ to 1.

Furthermore, the model of the bridge introduced in evidence and which is admitted to be correct, shows the triangle opening under each of these approach spans.

The witness Sutherland for the plaintiff, who testified to the filling up of these approach spans, said:

> "It was filled in on those approaches from the base of the piers clear up to the top of the grade *on a slant.*" (R. p. 159.)

While the opening beneath these approach spans could not be used as a passage-way for teams or vehicles, they nevertheless, afforded a passage-way for water.

* * * * * *

It is not surprising that the court, having erroneously assumed that the approach spans had been completely filled so that no water could pass thru them, and having completely overlooked the underpass or viaduct at Wibaux Street, concluded, as stated in the opinion, that "there is substantial evidence jusifying a finding by the jury that the company negligently failed to maintain an adequate opening in the embankment."

According to all of the testimony approximately one-half of the space beneath each of the approach spans was open for the passage of water. This would be equivalent to a twenty-foot opening. When to this is added the area of the opening at the viaduct at Wibaux Street, which was 35 feet at the bottom, 70 feet at the top, and 15 feet high, and the area of the opening or passage-way beneath the main span of the bridge over Beaver Creek, we find that the openings in the embankment aggregated more than 115 feet in length, which the witness Lyman

testified would be sufficient. The witness Lyman was the only witness for the plaintiff who expressed an opinion as to the passageway for water thru the embankment, which should have been provided. He testified as follows:

> "Q. Mr. Lyman, having heard all of the testimony of the defendant's witnesses here as to the bridge, what is your opinion as to whether any water would have gotten into the building shown to have been occupied by Nick Wagner on June 6 and 7, 1929, if there had been a bridge with openings 115 feet at Beaver Creek by the Northern Pacific Railway?
>
> A. I believe there would have been very little, if any.
>
> Q. By 'very little' how much?
>
> A. I am very doubtful whether there would have been any. I wouldn't say whether it would have hit the floor of that building, perhaps. As to whether, in my opinion, it could have gotten above the floor, will say that no one could tell that right down to a fine point. My opinion is, I don't believe it would have gotten to his floor." (R. pp. 787-788.)

II.

NO DUTY TO ANTICIPATE AND GUARD AGAINST UNPRECEDENTED FLOOD.

In the opinion in the instant case the court said:

> "It quite clearly appears that the flood of June 7, 1929, was much more serious in its consequence to the town of Wibaux than any that had preceded it. On this occasion, apparently, a number of cloudbursts which ordinarily would occur at more widely separated points poured their waters at the same time into Beaver Creek and its tributaries. But the mere fact that the flood was unprecedented in volume and extent does not relieve the defendant from liability. The Salton Sea Cases (C. C. A. -9), 172 Fed. 792, 819. The region's susceptibility to deluges was known to the defendant. Whether it was chargeable with anticipation of a flood the volume of the one in question was an

issue to be resolved by the jury. Such was the holding of the Supreme Court of Montana in a case arising against this defendant as a result of the same flood as the one now under consideration. Heckaman v. Northern Pac. Ry. Co., 93 Mont. 363, 382."

The court clearly misread or misconstrued the opinion in the Heckaman case. In that case the court held the Montana Statute to require a railroad embankment to be so constructed "as to allow for the passage of such water as was known to flow in the stream in time of usual freshets and such as might have reasonably been expected to in floods which are not usual but which experience shows might occur at any time." (Opinion p. 377.)

The court in the opinion in the Heckaman case further said:

"If a railroad corporation, in the construction and maintenance of its grade, bridges and culverts, has fully discharged the duty heretofore outlined, yet damage results from the insufficiency of the openings to carry away waters which come to it as the result of an unprecedented storm and consequent flood, there is no liability, as the necessary element of negligence is lacking. (Citing cases.) This is the only reasonable rule under such circumstances, for the term 'unprecedented' means 'novel, new, unexampled' (Webster's New Int. Dict.); *an act of God which no one can anticipate or guard aganst.*" (Italics ours.)

The court further said:

"Conceding that the storm of 1921 was 'unprecedented' and might not, under the authorities cited by counsel for defendant, be notice that a like or greater storm might thereafter occur, the evidence epitomized above is sufficient to warrant the finding that the openings in the embankment were, to the knowledge of the defendant, insufficient to permit the waters of Beaver Creek *'in ordinarily recurring high water'* to flow down the natural channel of the creek, and, consequently, establishes the violation by the defendant of the mandate of section 6507, above, in that

> the defendant did not restore the stream to its original usefulness, as near as may be.
>
> This antecedent and concurrent negligence is shown, and, as above pointed out, the evidence clearly shows that the damage done the plaintiff was 'in whole or in part', and perhaps wholly, due to this negligence. *It follows that the fact that the flood of* 1929 *was unprecedented is no defense, and the verdict and judgment are warranted by the evidence."* (Italics ours.)

It thus appears that the court did not decide in that case that whether the defendant should have anticipated and guarded against the flood of 1929 was an issue for the jury. What the court did decide was that there was no duty on the part of the defendant to anticipate and guard against the 1929 flood, which it found to be an unprecedented flood. The verdict of the jury was sustained upon the ground that there was sufficient evidence in that case "to warrant the finding that the openings in the embankment were to the knowledge of the defendant insufficient to permit the waters of Beaver Creek 'in ordinarily recurring high water' to flow down the natural channel of the creek," and that this negligence concurring with the unprecedented flood rendered the defendant liable. The court, recognized the rule that where the negligence of the defendant concurs with an act of God, there is no liability for the damage resulting from the act of God, and that the damages should be segregated. The court, however, decided that the trial court did not err in refusing an instruction with reference to segregation of damages, for the reason, as stated in the opinion, (p. 388), "the case was not tried upon the theory of segregable damages."

As a matter of fact, the Supreme Court of Montana in the case of Lyon v. Chicago, etc. Ry. Co., 45 Montana. 33, had de-

cided that an instruction which submitted to the jury the question of whether the defendant should have anticipated and guarded against an unprecedented flood was erroneous. In the opinion in that case the Court said:

> "However, the court also gave this instruction: 'No. 10. You are further instructed that by the act of God is meant those events and accidents which proceed from natural causes and cannot be reasonably anticipated or guarded against, such as unprecedented freshets, floods, earthquakes, cyclones, lightning, and such like. *For injuries occurring by any of these means, there is no liability, provided reasonable and ordinary care is exercised to guard against such occurrences.' In our judgment, this instruction does not correctly state the law. It, in effect, declared the defendants responsible for failure to anticipate and guard against an act of God.* We quote with approval the following language taken from the opinion of the court in Kansas City P. & G. R. Co. v. Williams, 3 Ind. Ter. 352, 58, S. W. 570: 'The rule of law in such cases is that the defendant is only required to take precautions against *ordinary storms* which occur in the vicinity; and if the damage would have occurred by the act of God, notwithstanding the obstruction, even if there were negligence on the part of the defendant, damages cannot be recovered. * * * In this case, unlike most cases in which the act of God is invoked as a defense, the act of negligence did not occur during the storm, or after it was over. Therefore the act is only made a negligent act by comparison with the duty which defendant owed before the storm. *It was not defendant's duty to foresee and prepare against an unprecedented storm; in other words, it was not defendant's duty to prepare against 'the act of God.' Its duty was only to prepare against ordinary storms'.*" (Italics ours.)

The case of Lyon v. Chicago, etc. Ry. Co., 45 Mont. 33, was cited approvingly by this Court in the case of Eikland v. Casey, 290 Fed. 880, 883.

In the case of Radburn v. Fir Tree Lumber Co., 145 Pac. (Wash.) 632, the court said:

> "But the law does not put upon men who are engaged in the prosecution of rightful enterprises the duty of anticipating that which is unprecedented, or which has not occurred in the memory of man."

See also cases cited in appellant's brief, pp. 9, 10, 30 and 31.

Authorities might be multiplied indefinitely holding that there is no duty to anticipate and guard against an unprecedented flood, or any act of God. In fact, this Court, in the case of Eikland v. Casey, 290 Fed. 880, said:

> "Surely plaintiffs cannot complain if the verdict was reached upon the ground that the damages were caused by an inevitable accident, as the result of vis major or act of God, against which one cannot reasonably be expected to guard,"

It is, of course, for the jury to say, where there is a conflict in the testimony, whether a flood was unprecedented, but where, according to all of the evidence, the flood was unprecedented, it is the duty of the Court to declare as a matter of law that the failure to anticipate and guard against such a fortuitous event does not constitute negligence.

It is inconsistent and contradictory to say that an unprecedented flood or act of God should be anticipated and guarded against. The very definition of an act of God is that it is something which no one can anticipate or guard against.

III.

THE COURT SHOULD HAVE CONSIDERED QUESTION OF ACTIONABLE NEGLIGENCE AND THE QUESTION OF PROXIMATE CAUSE.

The Court having found that the flood of 1929 was an un-

precedented flood, from which it follows that the defendant is not liable for any damage occasioned thereby, the Court should have considered the question of actionable negligence, discussed in the brief for appellant on pages 42 to 48.

It is not a question of whether the stream was restored to its former state of usefulness, generally speaking, but the question for determination is whether the restoration was such as to discharge the duty owing to the plaintiff. The plaintiff cannot complain except of negligence affecting his property.

There is no evidence that the railroad embankment ever retarded the flow of the water, even during the flood of 1921, so as to affect the property of the plaintiff.

The Court having found that the flood of 1929 was an unprecedented flood and there being no duty to anticipate and guard against such a flood, the defendant is not liable even though the failure to provide sufficient openings in the railroad embankment contributed to the damage, provided plaintiff's property would not have been damaged by any flow of water which should have been reasonably anticipated. The rule with reference to such a situation is stated by this Court in the case of Eikland v. Casey, 290 Fed. 880, 883. In the opinion it is said:

> "Surely plaintiffs cannot complain if the verdict was reached upon the ground that the damages were caused by inevitable accident, as the result of vis major or act of God, against which one cannot reasonably be expected to guard, provided the correct rule applicable was stated, as it was in substance: That if it were found that the construction of the bulkhead or flume contributed to or caused the damage complained of, and such result could not have been reasonably anticipated or foreseen, verdict should be for the defendants; but that, if the damage

> could have been reasonably anticipated as resulting from the construction of the bulkhead or flume, defendants would be liable."

The railroad embankment was constructed in 1881 and had been in existence 48 years before this flood in 1929. During that entire time the openings provided had been amply sufficient to prevent the retarding of the flow of water in Beaver Creek to the extent of causing any impounded water to reach the elevation of the site or land upon which the plaintiff's property is situated or to in any manner damage the property of the plaintiff. Under these circumstances, according to all of the authorities, defendant was not required to anticipate and guard against a flow of water in Beaver Creek in excess of the greatest flow during a period of forty-eight years.

The openings in the embankment, although they may not have been sufficient for the flood of 1929, are not the proximate cause of the damage suffered by plaintiff.

> Cole v. German Savings & Loan Society, 124 Fed. (8th Cir.) 113, and other cases cited on pages 48 to 54 of appellant's brief.

IV.

SALTON SEA CASES.

The rule applied in the Salton Sea Cases, 172 Fed. 792, 819, cited by the Court is not applicable to the facts of this case. Those cases involved a claim for damages resulting from the diversion of the water of the Colorado river into the canal of the defendant. In the opinion, the Court said:

> "The diversion of the river was made by the defendant and made in such a negligent manner that it resulted in the injury complained of. * * * Under the conditions prevailing in that locality and known to have existed for many

> years, it was the duty of the defendant to have maintained proper control of the water at its head-gates."

The Court further said:

> "The evidence shows conclusively that it was defendant's method of constructing the intakes that resulted in turning the flood of the Colorado river into the Salton sink."

It was in view of these findings that the Court decided that notwithstanding "an extraordinary flood came down the river contributing to the disaster," the defendant was liable.

The difference between the Salton Sea Cases and the instant case is that in those cases the extraordinary flood would not have contributed to the damage except for the negligence of the defendant, whereas in the instant case there would have been no damage except for the unprecedented flood.

Th rule applied in the Salton Sea Cases is well stated by the Supreme Court of Montana in the case of Raish v. Orchard Canal Co., 67 Mont. 140-146. That case involved a claim for damages resulting from the over-flow of a canal, which it was alleged was caused by the negligent construction or maintenance of the headgate. It was contended, as a defense, that the over-flow of the canal was due to an extraordinary flood. The Court, in the opinion, said:

> "However, it is equally well settled that whenever two causes combine proximately to produce an injury, the one being a culpable negligent act of the defendant and the other an act of God for which neither party is responsible, the defendant is liable for such loss as is caused by his own act concurring with the act of God, *provided the loss would not have been sustained by plaintiff but for such negligence of defendant.*" (Italics ours.)

See also: 45 Corpus Juris, p. 939.

Wherefore petitioner prays that a rehearing be granted and a re-argument of the case had.

Respectfully submitted,

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THIS IS TO CERTIFY that in my judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

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Attorney for the Northern Pacific Railway Company, Appellant.